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18 U.S.C. 545 — 2

718-180—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 738

CHARLES TRAVITZKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1-2; R. 353-354) is reported at 322 F. 2d 1023.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1963 (Pet. App. 3; R. 355). A petition for rehearing (R. 357-366) was denied on December 10, 1963 (R. 367). The petition for a writ of certiorari was filed on January 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner committed the crime of smuggling in violation of 18 U.S.C. 545 where the diamonds he clandestinely introduced into the United States were discovered during customs inspection.

STATUTE INVOLVED

18 U.S.C. 545 provides in pertinent part:

> Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced * * *; or
>
> Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

STATEMENT

Following a jury trial held in the United States District Court for the Southern District of Florida, petitioner was convicted of violating 18 U.S.C. 545 (see *supra*), in that on or about January 10, 1962, he fraudulently and knowingly brought into the United States 248.93 carats of diamonds without declaring them to customs (count 1), and that he smuggled these same diamonds into the United States without invoicing them or paying the requisite duty (count 2) (R. 1, 24, 324, 326–327).[1] Petitioner was

[1] The third count of the indictment, charging an unlawful importation of gems on a later date, was dismissed before trial on motion of the government (R. 45).

sentenced to two years imprisonment on each count, the sentences to run concurrently (R. 32, 347). In a *per curiam* opinion, the court of appeals unanimously affirmed (Pet. App. 1-2; R. 353-354; 322 F. 2d 1023).

The evidence showed that petitioner returned to the United States from South America on January 10, 1962. During customs inspection, petitioner declared that he had returned with certain items of jewelry he had previously registered with the customs authorities and also with some liquor. Petitioner, who was a suspected diamond smuggler (R. 140, 142; 163–167), was asked a number of times by several customs inspectors if he had any other merchandise or jewelry to declare and he replied that he did not. (R. 58–63; 74–79; 100; 110, 113–116, 150, 196-198.) In petitioner's suitcase customs agents found, *inter alia*, an electric razor, a tube of lubricating jelly, a number of rubber "finger stalls",[2] and two styptic pencils, one of which was contained in a plastic tube. There was no container for the other styptic pencil. Petitioner explained that he had lost the other container and that he used these articles to prevent against and to remedy cuts (R. 81–83; 117–119; 147–150).

At this point, petitioner was asked to disrobe and a search of his clothing was conducted. One of the agents noticed a foreign substance lodged in petitioner's rectum and petitioner was asked to eject what was in his body. He refused. The supervising

[2] One of the agents explained that a finger staff was "a piece of rubber thicker than a balloon and something which would fit over a finger" (R. 81).

agent then went to get a doctor from the Public Health Service so that an internal examination of petitioner could be conducted. While he was gone, petitioner informed another agent that he had "some diamonds" secreted in his body. When the supervising agent returned, petitioner told him the same thing and, in the presence of two agents, removed from his rectum a plastic vial wrapped in rubber finger stalls coated with jelly. This vial continued a quantity of loose diamonds (R. 83–89; 120–121; 131; 151–156), weighing 248.93 carats (R. 180). Their domestic value was estimated at $47,330.00 and their foreign or export value at $22,700.00 (R. 183). The duty on these diamonds was $2,270.00 (R. 183).

ARGUMENT

Petitioner's sole argument is that he could not properly be convicted of smuggling or fraudulently bringing diamonds into the United States since such offenses would be complete only when the customs barrier was passed—whereas, in this case, the diamonds he had concealed in his rectum were declared by him and turned over to the customs authorities before the customs barrier was crossed. Petitioner's conviction of fraudulently bringing diamonds into the United States (count 1)—which wholly supports his two year sentence[3]—would not on any basis be subject to this kind of attack. See *Wong Bing Nung* v. *United States*, 221 F. 2d 917, 919-920 (C.A. 9); *Gillespie* v. *United States*, 13 F. 2d 736, 738 (C.A. 2),

[3] See *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Pinkerton* v. *United States*, 328 U.S. 640, 641-642.

certiorari denied, 273 U.S. 730. His argument is in any event fully answered by this Court's decision in *United States* v. *Ritterman,* 273 U.S. 261. In that case, on facts essentially like those involved here,[4] this Court, speaking through Mr. Justice Holmes, rejected a similar claim observing (273 U.S. at 268):

> If they [the diamonds] had been carried across the boundary in such a way as to avoid a port of entry, we suppose that the offence of smuggling would have been complete when they passed the line, although the smuggler might repent and afterwards report for payment of duties. We perceive no difference because of the accident that the goods had to pass a customs house which the respondent's fraud had deprived of further function if it had not been found out.

Petitioner persisted in his concealment of the diamonds until it became obvious that the customs agents would find them. In these circumstances, his belated admission that he had gems does not relieve him of liability for smuggling. See *United States* v. *Ritterman, supra; Newman* v. *United States,* 276 Fed. 798,

[4] The facts of *Ritterman* reveal that, while in Montreal, Canada, the defendant purchased a railroad ticket for New York City. Before leaving, he brought his travelling bag to the United States customs office in Montreal for inspection. At that time, he told a customs inspector that his bag contained only his personal wearing apparel. An inspection of the bag did not reveal any jewelry. When petitioner arrived at the port of entry in Vermont, he told customs inspectors that he had no diamonds to declare. He was advised that the inspectors had information that he had diamonds with him. He was asked to undress for a search of his person and on demand turned over the key to his travelling bag. While undressing he admitted that the diamonds were in his bag.

800 (C.A. 2), certiorari denied, 258 U.S. 623; *Rogers* v. *United States*, 180 Fed. 54, 60 (C.A. 6); *United States* v. *218½ Carats Loose Emeralds*, 153 Fed. 643, 648 (S.D. N.Y.), affirmed on other grounds, 154 Fed. 839 (C.A. 2).[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1964.

[5] The cases upon which petitioner relies are inapposite. They stand for the entirely different proposition announced by this Court in *Keck* v. *United States*, 172 U.S. 434, as construed in *Ritterman*, *supra*, 273 U.S. at 268, that the crime of smuggling is not complete as to ship-laden goods which, although they have passed into the territorial waters of the United States, have not been unloaded. See *e.g.*, *McGill* v. *United States*, 28 F. 2d 572 (C.A. 9); *Wong Bing Nung* v. *United States*, 221 F. 2d 917 (C.A. 9).

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